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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

LAURA CARSNER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE EIGHTH COURT OF APPEALS OF TEXAS
CAUSE NUMBER 08-11-00326-CR

APPELLANT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE CASE

This is a petition for discretionary review from the judgment of the Eighth Court of Appeals, affirming Appellant's conviction for capital murder in the 171st District Court. Appellant was indicted for this offense on November 18, 2009 (1 CR 3), convicted after a trial by jury on July 25, 2011 (10 RR 121-24), and sentenced by the court on July 26, 2011 to a term of life imprisonment in the Texas Department of Criminal Justice, Institutional (now Correctional Institutions) Division, without the possibility of parole. (11 RR 6) On October 7, 2011, the trial court denied Appellant's motion for new trial. (14 RR 4-5) The Eighth Court of Appeals reversed that decision on October 9, 2013 and remanded the case for a new trial. *Carsner v. State*, 415 S.W.3d 507 (Tex. App. – El Paso 2013). This Court granted the State's petition for discretionary review and, on September 24, 2014, vacated the judgment of the Court of Appeals and remanded to that Court for consideration of unaddressed arguments in the State's brief. *State v. Carsner*, 444 S.W.3d 1 (Tex. Crim. App. 2014). On June 15, 2018, the Court of Appeals, after addressing those arguments, affirmed Appellant's conviction and sentence in an unpublished opinion. *Carsner v. State*, 2018 WL 2998194 (Tex. App. – El Paso No. 08-11-00326-CR, June 15, 2018). This Court then granted Appellant's petition for discretionary review on December 5, 2018.

ISSUES PRESENTED

1. Whether, as a matter of law, evidence that has been forgotten by a defendant is unknown, for purposes of the newly-discovered-evidence rule, only if the defendant forgot about it because of a physical or mental condition, such as amnesia or repression, that was caused by a traumatic event, debilitating injury, or disease, the existence of which can be confirmed by science or medicine.

2. Whether, as a matter of law, a defendant who fails to recall evidence, once known but since forgotten , has not, for purposes of the newly discovered evidence rule, exercised diligence to discover or obtain such evidence.

STATEMENT OF FACTS

Laura Carsner was convicted of capital murder and sentenced to life in prison without parole for shooting to death her elderly mother and stepfather. At trial, she claimed to have been sexually abused by her stepfather during her childhood and adolescence, from which she suffered a variety of mental health and addiction issues throughout her life. Ironically, because of these very issues, her parents initiated a complaint with Child Protective Services (CPS) that resulted in the removal from Carsner's custody of her young daughter Andrea.

During judicial hearings to determine whether Carsner would be reunited with her daughter, Carsner learned that her mother and stepfather had been allowed unsupervised visitation with Andrea. Carsner also suspected from other sources that Andrea had herself been sexually abused during their separation. When the court refused to prohibit further unsupervised visitation between Andrea and Carsner's parents, Carsner became hysterical with fear for her daughter's safety.

Having recently purchased a handgun for protection at her residence in Austin, Carsner decided to abduct Andrea from her parents' home during their next unsupervised visitation, and then take Andrea to be examined by a physician. But, when Carsner entered her parents' backyard during a cook-out, looking for Andrea,

she encountered resistance when her parents rushed toward her. Carsner reacted by firing multiple shots at close range, killing them both. By then, Andrea had fled into the house. Carsner's purpose effectively thwarted, she left the scene in shock and drove away. She later turned herself in to the police on the other side of town.

At her trial for capital murder, Carsner testified that she never intended to kill her parents, that her purpose was to remove her daughter from their household, and that she fired the fatal shots to protect herself when her stepfather, Javier Quiroz, rushed toward her in an apparent effort to seize her gun. As a factual matter, the core of Carsner's defense was that her actions were motivated by concern for the safety of her daughter. That was the most hotly contested question at her trial, and more time was devoted to it by both sides than to any other issue of law or fact in the case. Ultimately, its resolution depended on one thing: was it really true that Carsner had been sexually assaulted by her stepfather for years while she was growing up in his house? If she was not, then her defense was implausible because she did not actually have anything to fear from her daughter's living with him or from his unsupervised visitation with her. If she was, then her concern was well-founded, and would likely have impaired her judgment as a mother to the point that she acted irrationally, particularly in light of the emotional and psychological disabilities she

had suffered throughout her life as a result of his abuse. The jury was authorized by the court's charge to register a decision in Carsner's favor on this issue by concluding that she had caused the death of her parents recklessly or negligently, rather than intentionally or knowingly, and by convicting her of manslaughter or negligent homicide, instead of capital murder.

Throughout trial, and during closing, the prosecuting attorney adduced evidence and engaged in argument designed specifically to cast doubt on Carsner's claim that her stepfather had ever abused her, contending that Carsner had fabricated the story for purposes of the CPS investigation. She produced expert testimony contradicting in part that of defense experts who opined that Carsner's conduct was deeply affected by psychiatric disorders related to the sexual abuse she suffered as a child. She pointed to circumstances before, during, and after the fatal shootings which suggested that Carsner's account was implausible. Above all, she emphasized, especially through the testimony of expert witnesses, that Carsner had never made an outcry of sexual abuse by her stepfather until her mother complained to Child Protective Services about Carsner's fitness as a parent. After a painful, protracted deliberation, the jury eventually convicted Carsner of capital murder.

Meanwhile, one of Carsner's friends from high school, Henry O'Hara, read a

newspaper account of the state's closing argument. O'Hara remembered Carsner telling him about the abuse, including much of the same detail, more than thirty years earlier. On his own initiative, and without having seen or spoken to Carsner in ten years, O'Hara called the District Attorney, who in turn disclosed O'Hara's identity and information to Carsner's defense counsel. Counsel then timely filed a motion for new trial, alleging newly discovered evidence.

A hearing was held, and numerous witnesses called. The trial judge found that Carsner would have been entitled to a new trial based on the discovery of this evidence but for the fact that it was merely cumulative or corroborative of other evidence in the case. However, the Eighth Court of Appeals rightly concluded that the evidence was not "merely" cumulative or corroborative because, unlike any other evidence in the case, it was relevant to rebut the prosecuting attorney's suggestion of recent fabrication. Because such rebuttal was critical to the success of Carsner's defensive strategy, the Court also found that the result of trial would likely be different in view of the new evidence, reversed Carsner's conviction, and remanded the case for a new trial without addressing the State's argument that the evidence could not have been newly discovered because Carsner herself had told O'Hara about it years before.

SUMMARY OF THE ARGUMENT

The issue in this case devolves into a few simple questions. First, is the criterion necessary to obtain a new trial based on newly discovered evidence that requires the movant to establish she did not know of the existence of the evidence prior to and during trial a question of fact or a question of law? If it is a question of fact, is credible evidence that she forgot about the existence of the evidence due to the passage of time sufficient to satisfy the criterion if believed by the trial court? If it is a question of law, is the existence of evidence once known but later forgotten due to the passage of time, nevertheless known to the movant as a matter of law for purposes of the newly-discovered-evidence rule? And finally, if it is a rule of law, does it apply only to evidence the existence of which was forgotten due to the passage of time or also to evidence once known that was later forgotten due to amnesia or repression caused by a medically or psychologically verifiable event or condition?

It is the position of the State and of the Eighth Court of Appeals that the existence of evidence once known but later forgotten due to the passage of time is nevertheless known to the movant as a matter of law and will not support a motion for new trial based on newly discovered evidence even if believed by the factfinder,

but that the existence of evidence once known but later forgotten due to amnesia or repression caused by a medically or psychologically verifiable event or condition is not known to the movant as a matter of law and will, if believed by the factfinder, support a motion for new trial based on newly discovered evidence.

On the other hand, it is Carsner's position that the existence of evidence once known but later forgotten for any reason at all is actually unknown, that the purposes of the newly-discovered-evidence rule are best promoted by making new trials available to all who were actually unaware prior to and during trial of material evidence later discovered, and that the question whether the existence of such evidence was actually unknown to the movant prior to and during trial is a question of fact to be determined by the trial court based on its assessment of the credibility and weight of the evidence offered in support of the motion.

ARGUMENT AND AUTHORITIES [1]

To establish her claim of newly discovered evidence, Carsner had to satisfy four criteria: (1) that the evidence was unknown or unavailable to her at the time of her trial; (2) that her failure to discover or obtain the evidence was not due to a lack

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[1] Issues Presented which have been grouped for argument have a common or similar basis in law or fact which makes it more comprehensible to present them together and avoids undesirable duplication of material in the brief.

of diligence; (3) that the evidence was not merely cumulative, collateral, corroborative, or impeaching; and (4) that the evidence is probably true and would probably bring about a different result on another trial. *Keeter v. State*, 74 S.W.3d 31, 36-37 (Tex. Crim. App. 2002). See also TEX. CODE CRIM. PROC. art. 40.001.

In its original opinion, prior to remand from this Court, the Court of Appeals concluded that the third and fourth prongs of the newly-discovered-evidence test had been satisfied by Carsner. The Court did not address the State's argument that prongs one and two were improperly sustained by the trial court. *Carsner v. State*, 415 S.W.3d 507 (Tex. App. – El Paso 2013).

In its petition for discretionary review, the State did not complain that the Court of Appeals erred in its disposition of prong three (that the evidence was not merely corroborative, cumulative, or impeaching), but did complain that the Court erred with respect to prong four (that the newly discovered evidence would probably bring about a different result). The State also complained that the Court of Appeals erred not to address it's argmuments as to prongs one and two.

This Court granted the State's petition for discretionary review as regards the failure of the Court of Appeals to address the State's arguments that prongs one and two were decided erroneously by the trial court, vacated the judgment of the Court

of Appeals , remanded for further proceedings, and dismissed without prejudice the State's argument that the Court of Appeals erred to find in Carsner's favor on prong four. *State v. Carsner*, 44 S.W.3d 1 (Tex. Crim. App. 2014).

On remand, the Court of Appeals resolved the question whether Carsner had satisfied the first two prongs of the newly-discovered-evidence test in favor of the State, and affirmed her capital murder conviction, but did not revisit the question whether the evidence at issue would probably have produced a different result. *Carsner v. State*, 08-11-00326-CR, 2018 WL 2998194 (Tex. App.—El Paso June 15, 2018, pet. granted).

Carsner then filed a petition for discretionary review of the Court of Appeals holding with respect to prongs one and two that the evidence was not newly discovered and that Carsner did not exercise diligence to discover it, which this Court granted. The State, although entitled to do so, did not file a petition reurging discretionary review of the Court of Appeals's earlier conclusion as to prong four. TEX. R. APP. PROC. 68.2(b). Accordingly, the only issues currently before this Court on discretionary review are whether the El Paso Court of Appeals erred with respect to prongs one and two of the newly-discovered-evidence test.

The Court of Appeals identified these issues as questions of law. Bound by the

precedents of this Court, to accept the credibility judgments of the trial court, it found that Carsner had, in fact, forgotten that she confided in O'Hara and that O'Hara came forward on his own after trial without having been contacted by Carsner or her legal counsel.

> [T]he trial court must have found O'Hara to be a credible witness and that he had voluntarily come forward when he learned from the newspaper article that Appellant had been convicted in part due to the State's argument that Appellant had recently fabricated her claim of childhood sexual abuse. The trial court also must have necessarily believed Appellant's testimony that she did not remember confiding in O'Hara and defense counsel's testimony that she did not inform him that she had confided in O'Hara. Had she done so, counsel would have attempted to locate O'Hara to secure his testimony at trial. We defer to those credibility determinations on appeal. [*State v.*] *Thomas*, 428 S.W.3d [99], at 104 [(Tex. Crim.App. 2014)]. The dispositive issue then is a legal one—whether we should recognize the evidence of Appellant's outcry to O'Hara as being "newly discovered" evidence that was unknown or unavailable to Appellant at the time of trial, and whether Appellant failed to use due diligence to discover the evidence prior to trial.

Carsner, 2018 WL 2998194, at *4.

The Court of Appeals subdivided its analysis of the prong-one issue into three parts. It first reviewed extant caselaw in which new trial movants claimed to have discovered alibi evidence (mostly witnesses) after trial, and concluded that such evidence was categorically incapable of being newly discovered within the meaning of the first prong of the *Keeter* newly-discovered-evidence test.

The Court then discussed a handful of cases (also mostly involving evidence of alibis) in each of which the new trial movant sought to excuse or explain his failure to discover evidence prior to trial by claiming that he had forgotten about it. The Court of Appeals also classified these cases as categorically ineligible for new discovery after trial under the first prong of the *Keeter* rule.

Finally, the Court carved out an exception for evidence once known but later forgotten as a result of physical injury resulting in amnesia and perhaps also as a result of psychological trauma resulting in memory repression. Because Carsner did not claim that her memory loss came within this exception, the Court of Appeals held that the evidence she had forgotten was not, as a matter of law, newly discovered under the first prong of the *Keeter* test, and that the trial court had abused its discretion to find that it was.

For basically the same reason, the Court of Appeals also found that Carsner did not meet the second prong of the *Keeter* test because, if she had just tried a little harder, she might have remembered that she told O'Hara about being sexually abused by her stepfather thirty years ago. Accordingly, the trial court also abused its discretion, according to the Court of Apeals, by finding that she and her lawyer had exercised sufficient diligence to locate O'Hara.

Alibi Evidence

As suggested by the State in its briefing, the Court of Appeals began its discussion by "analogiz[ing] the present case to situations in which a defendant has come forward with a new alibi witness after trial." *Carsner v. State*, 08-11-00326-CR, 2018 WL 2998194, at *5 (Tex. App.—El Paso June 15, 2018, pet. granted). The alibi cases upon which the Court of Appeals relied are few, and therefore merit consideration one at a time, beginning with *Drew v. State*. Drew's motion for new trial alleged that the testimony of his codefendant, Mike Puralewski, was unavailable to him during his trial for a variety of reasons, including Puralewski's privilege against self-incrimination and a mental illness from which Puralewski had since recovered sufficiently to give credible testimony. The trial court denied the motion for new trial.

On direct appeal, this Court affirmed the trial court on a variety of grounds, observing at one point "that if Puralewski's testimony was true that although present, appellant did not participate in the murder, and did not rob and steal, then the matter of non-participation was certainly known to the appellant at the time of trial." *Drew v. State*, 743 S.W.2d 207, 227 (Tex. Crim. App. 1987).

There is no reasonable reading of this language that would support a rule of law such as that for which the State and the Court of Appeals contend in this case.

Drew did not claim that he lacked knowledge of Puralewski's potential testimony or that he had somehow forgotten about it until after the conclusion of his trial. And, because Drew did not even allege that Puralewski's testimony was unknown to him, it is unclear what the langauge quoted above really had to do with the Court's disposition, let alone what precedential value it has in this case.

Perhaps of even greater importance, particularly as it relates to other alibi cases, is that this Court's specific conclusion in *Drew* that "the matter of non-participation was certainly known to the appellant at the time of trial" is a finding of fact, pure and simple, and does not remotely suggest that the testimony of an alibit witness can never, as a matter of law, be newly discovered after trial. Other cases upon which the State and the Court of Appeals relied are much the same.

In *Baker v. State*, the defendant produced a witness, James McDondle, at the hearing of his motion for new trial to testify that, at the time of the robbery for which the defendant was convicted, he was playing pool with McDondle in another city. The trial court denied the motion for new trial. On direct appeal, this Court resolved the issue with a few perfunctory remarks.

> The appellant contends that because of this "newly discovered" evidence a new trial should have been granted. We overrule this

> contention. Since appellant must have known prior to the trial where he was and what he was doing, and who he was with, the evidence of alibi presented by McDondle could not have been considered as "newly discovered."

Baker v. State, 504 S.W.2d 872, 875 (Tex. Crim. App. 1974). Thus, this Court resolved the issue by concluding as a matter of fact that the appellant had not met the first prong of the newly-discovered -evidence test. Again, there is no suggestion that the appellant would not have been entitled to a new trial had he actually been unaware of the alibi witness.

Again, in *Villarreal v. State*, the trial court denied the appellant's motion for new trial without any specific findings of fact or conclusions of law. Villarreal sought to convince the trial court that he had been with his sister, Carol Escamilla, all day visiting their mother in the hospital when the burglary for which he was convicted occurred. His sister testified at Villarreal's motion-for-new-trial hearing that she was not aware her brother was charged with a crime until after his trial.

On direct appeal, the Thirteenth Court of Appeals affirned, holding that, "[s]ince appellant must have known prior to the trial where he was, what he was doing, and who he was with on June 5, 2000, Escamilla's alibi evidence cannot be considered 'newly discovered.'" *Villarreal v. State*, 79 S.W.3d 806, 814 (Tex. App.—Corpus Christi 2002, pet. ref'd). This too was a straightforward finding of fact

by the Court of Appeals, and does not stand for the proposition that the existence of an alibi witness can never be discovered for the first time after trial.

Likewise, in *Seals v. State* the defendant moved for a second continuance in order, among other things, to locate three alibi witnesses whose testimony he alleged to be more credible than that of his other alibi witnesses. 634 S.W.2d 899, 901-902 (Tex. App. – San Antonio 1982, no pet.). Because it was a second motion for continuance and did not satisfy the rule for such motions that the evidence could not have been procured from any other source, the trial court denied it and the court of appeals affirmed. *Id*. at 903.

When the defendant finally located his missing three witnesses after his conviction, he claimed that they were newly discovered. But for multiple reasons, including a lack of diligence to obtain their testimony before trial, the court of appeals affirmed the trial court's denial of the defendant's new-trial motion. Along the way, the court observed in passing that, "[i]f these additional witnesses sought to corroborate appellant's alibi defense they must of necessity have been with appellant, and he must have known of their testimony prior to trial." *Seals*, 634 S.W.2d at 908. Again, there is no basis for concluding from this disposition of the case that the court of appeals was applying a rule of law that alibi witnesses are

never newly discoverable.

Finally, the Court of Appeals cited *Martinez v. State*, in which the defendant claimed in his motion for new trial that he was not able to obtain until after his conviction for indecency with a child various items of documentary evidence proving "that he had been incarcerated [in Tennessee] on two occasions at the approximate time of the alleged offense." 824 S.W.2d 688, 692 (Tex. App.—El Paso 1992, pet. ref'd). The trial court denied his motion for new trial, and the court of appeals affirmed, holding that "Appellant himself surely knew at trial that he had been in jail at those times and could have testified as such." *Id*.

While it is not clear why the court of appeals thought that the appellant's own testimony would have been an acceptable substitute for prison records from the State of Tennessee, the undisputed fact that appellant "knew at trial that he had been in jail at those times" clearly foreclosed a relitigation of the case based of newly discovered evidence. The Court's disposition did not, however, involve any special rule of newly-discovered-evidence law applicable especially to alibi evidence. Rather, it was a simple application of the settled rule that evidence alleged to have been newly discovered after trial must actually have been unknown to the defendant before trial.

Thus, in each of the alibi cases upon which the Court of Appeals relied to deny Carsner relief in this case, it is reasonably clear that the appellate court found as a matter of fact, or sustained the factual finding of a trial court, that the defendant was not entitled to a new trial because he was actually aware before trial of the evidence he claimed to be newly discovered. In no case did the appellate court purport, either expressly or by necessary implication, to hold as a matter of law that alibi evidence is categorically undiscoverable for the first time after trial.

Forgotten Evidence

The alibi cases discussed above did not involve any expressed contention of the defendants that they had forgotten about the existence of the evidence they claimed to be newly discovered. But in other cases, also mostly involving alibis, defendants have made that claim, and the El Paso Court of Appeals found from its reading of those cases that a failure to remember evidence does not excuse the failure to produce it at trial. But there is nothing in those cases that actually supports the Court's reading.

In *Brown v. State*, this Court rejected, apparently for lack of diligence, the appellant's claim of newly discovered alibi witnesses in spite of his having forgotten about them until after trial, saying that

> Complaint is made relative to the court's overruling appellant's motion for a new trial in that he had the testimony of two newly discovered witnesses as to appellant's whereabouts at or near the hour of 5:00 o'clock P.M. on February 16, 1946, and that appellant was in the city of Nacogdoches at such time and therefore could not have been at this dance hall at that particular time. . . . Appellant's excuse for not having such witnesses present at the trial is that he did not remember having seen them until the matter was called to his attention by one of the witnesses, although he was bound to know of his own whereabouts on the afternoon and evening of the time mentioned by the officers and of his arrest.

Brown v. State, 150 Tex. Crim. 285, 292, 201 S.W.2d 50, 55 (1946).

Likewise, in *McCollum v. State*, the appellant produced after trial the affidavits of five men who swore that he was elsewhere when the offense was committed. Again, this Court found a lack of diligence, observing that

> As his nearest approach to diligence, appellant swears in his motion for new trial that from the time of his indictment he made diligent inquiry of every person whom he thought would know the whereabouts of three of the parties named who had worked for him, and whom he had discharged after December 11, 1926, but was unable to locate any of them. He avers that he forgot about his transaction with the other two parties named and forgot that he spent the night of December 11, 1926, at Baker's Hotel. All these facts were within appellant's knowledge before he was tried.

McCullom v. State, 112 Tex. Crim. 317, 321–22, 16 S.W.2d 1087, 1089 (1929).

Similar results were reached for the same reason by the former courts of civil appeals.

> The record shows that the defendant knew of the alleged newly discovered evidence prior to the trial and made no effort to produce said evidence on the trial; his only excuse for not having the witness' testimony being that the matter had "slipped" his memory. In this state of the record it cannot be held that the trial judge abused his discretion in refusing to grant a new trial on the ground of newly discovered evidence.

Clemmons v. Johnson, 167 S.W. 1103, 1104 (Tex. Civ. App.—Galveston 1914, no writ)

> [T]he trial court [did not] err in overruling the motion for new trial based on alleged newly discovered evidence, shown in the ex parte affidavit of D. B. Leggett, since such testimony is merely cumulative of the testimony of the witnesses J. B. Tillman and Grover Clayton given upon the trial of the case, and the affidavit of the defendant L. T. Adams shows that he knew at the time of the conversation related in the affidavit of Leggett that he (Leggett) was present and then heard what was said in that conversation; the only reason offered for failure to introduce Leggett as a witness being that he had forgotten such presence of Leggett until reminded of it by what Leggett told him after the trial of the case.

Adams v. Stark, 280 S.W. 1074, 1076 (Tex. Civ. App.—Fort Worth 1925, writ dism'd w.o.j.)

More recently, in a case not involving evidence of alibi, the trial court denied a defendant's motion for new trial in which he alleged that he had recently discovered a juvenile court order that exempted him from registering as a sex offender. The Second Court of Appeals wasted little time affirming.

> Appellant's motion for new trial alleged that his counsel did not know of the juvenile court's order; however, after a hearing, the trial court

> determined that although appellant's counsel was not aware of the order, appellant was aware of it. Appellant testified that he knew about the juvenile court's order when it was rendered because he was present, but he had forgotten about it since that time and did not know where the copy of the order was located. . . . Evidence that is known to the appellant, but which the appellant does not communicate to his or her attorney, is not "newly discovered" for purposes of article 40.001.

Cornell v. State, 02-10-00056-CR, 2011 WL 856910, at *2 (Tex. App.—Fort Worth Mar. 10, 2011, no pet.) (not designated for publication).

Although this brief analysis of the issue might be read for the proposition that the existence of evidence forgotten by the defendant is nevertheless somehow known to him unconsciously, the more plausible reading is that the trial court was simply unwilling to believe that the defendant had really forgotten about it, since the trial court found, according to the Court of Appeals, that "appellant was aware of [the evidence.]"

It is thus clear that none of the cases upon which the El Paso Court of Appeals relied actually stands for the proposition that forgotten evidence is, as a matter of law, not really unknown within the meaning of the newly-discovered-evidence rule. Instead, in each case, the appellate court found, or ratified a trial court finding, that the defendant did actually remember the existence of the evidence, in spite of his claim to the contrary, or that he actually remembered enough about where he was

and what he was doing to have discovered the evidence through reasonably diligent efforts.

Exception for Amnesia

The Court of Appeals did recognize one narrow exception to its new rule of law based almost exclusively on an opinion of the First Court of Appeals in Houston. In *State v. Reynolds,* the defendant was convicted of burglary with intent to commit assault by driving his car into a house occupied by his ex-wife, their children, and her boyfriend. He was arrested at the scene, unconscious and with self-inflicted stab wounds to his abdomen. The day before the incident, he had written a letter to his children, explaining that he intended to take his own life and urging them not to feel responsible in any way for it. The letter was later turned over to the prosesuting attorney by his ex-wife but not disclosed to the defense before trial.

When defense counsel later discovered the letter, he filed a motion for new trial, claiming that the letter was newly discovered evidence material to the question whether appellee intended to assault his wife or her boyfriend when he drove his car into their home. The trial court granted a new trial and the Houston Court of Appeals affirmed. Its entire analysis of the question whether the evidence was unknown to the defendant/appellee before and during trial was as follows:

> The appellee argues that he did not know about the letter even though he wrote it. At trial, the appellee testified he did not remember anything about the incident. In an affidavit attached to his motion, the appellee's counsel states the appellee's memory loss is documented in a notice of intent to raise the issue of insanity, a request for competency hearing, and a request for psychiatric evaluation. We hold this is sufficient to meet first the element of newly discovered evidence, that the evidence was unknown to the appellant [sic] at the time of trial.

State v. Reynolds, 893 S.W.2d 156, 159–60 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

The Houston Court of Appeals did not expressly address the question whether forgotten evidence is ordinarily known to the defendant within the meaning of the newly-discovered-evidence rule, nor did the Court discuss other cases of memory loss such as were reviewed and relied upon by the El Paso Court of Appeals in the instant case. But the plain effect of the Houston Court's disposition is that forgotten evidence can be newly discovered, or perhaps rediscovered, under some circustances sufficient to satisfy the newly-discovered-evidence rule.

Interestingly, instead of rejecting this holding, the El Paso Court embraced it as an "exception[] to th[e] general rule [that forgotten evidence is not newly discovered], such as when a defendant suffers from amnesia or some other physical ailment that prevented him from recalling an incident prior to trial." *Carsner*, 2018

WL 2998194, at *6. Indeed, the El Paso Court surmised that an exception might also be made for memories repressed as a result of psychological trauma but later recovered through therapy, the "scientific validity" of which has been "recognized" by some courts of law. *Id*. "In such cases, it may not be appropriate [said the Court] to equate repressed memory that is later regained with a memory that is simply forgotten and later remembered." *Id.*

Of course, as in *Reynolds*, Laura Carsner did not later remember the evidence, even after she was reminded of it. Instead, its existence was discovered, as in *Reynolds*, by someone else. Ironically, however, the El Paso Court did not actually regard that circumstance to be relevant, since it held as a matter of law that forgotten evidence is not unknown to the defendant unless it comes within an exception for evidence that was forgotton as a result of some physical or psychological injury, malady, or condition that is recognized by science. *Id.* at 6-7.

But an exception for such kinds of memory loss does not really make much sense in light of the real reason courts have nearly always rejected later-remembered evidence – that those who claim to have remembered the existence of exculpatory evidence only after trial either lied about their memory loss at their motion-for-new-tial hearings or made no real effort to track down known witnesses

before trial.

Neither of these circumstances describes Carsner's case. Not only is there no reason to believe that she was lying in her new-trial testimony, but her testimony was plausible, as the Court of Appeals conceded, and was strongly probative of actual memory loss due to the passage of time. The fact that decades had elapsed since her relationship with O'Hara and the uncontroverted fact that O'Hara came forward on his own militates strongly in favor of the conclusion that Carsner was actually unaware of O'Hara's availablity as an important defense witness before trial. In any case, the trial judge, as factfinder, actually believed that she did not remember telling O'Hara about the sexual abuse she had suffered at the hands of her step-father, and the El Paso Court of Appeals accepted that finding as true, just as this Court must do.

Likewise, the failed efforts taken by Carsner and her defense attorneys at trial to find evidence establishing that her claim of sexual abuse was not a recent fabrication were described both by her and by her trial counsel, credibly and in sufficient detail to establish that such efforts were substantial, timely, and diligent. Their testimony was found to be true by the trial court, and it should therefore have been accepted as true by the El Paso Court of Appeals. The suggestion of the Court

of Appeals that Carsner would necessarily have recalled telling O'Hara about her step-father's abuse had she but made a more diligent effort to jog her own memory is unsupported by the evidence or any reasonable inferences therefrom. In any case, it was within the discretion of the trial court to believe, based on the testimony adduced, that Carsner's efforts and those of her lawyers were sufficient to satisfy the diligence criterion of the *Keeter* test.

There is no rule of law that the existence of evidence, once known but since forgotten, can never qualify as newly discovered unless the defendant's memory loss was due to a medical or psychological condition. The newly-discovered-evidence rule exists to permit the retrial of cases when evidence that was actually unknown or undiscovered before trial through no fault of the defendant or her lawyers, and that might realisitically have changed the outcome of trial had it been produced in court, is later discovered or becomes available. It is a fair rule and one that promotes the interests of justice. Because there is no question, based on the reasonable findings and conclusions of the trial court, that Carsner was not in any sense at fault for failing to remember O'Hara's importance as a defense witness, it follows under extant case law that she has met the *Keeter* test, and is therefore entitled to a new trial.

PRAYER FOR RELIEF

For the foregoing reasons, Appellant requests that the judgment of the Eighth Court of Appeals be reversed, and that the case be remanded for a new trial.

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CERTIFICATE OF COMPLIANCE

I hereby certify in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing brief contains 6,188 words, exclusive of the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

/s/ Robin Norris
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served electronically through the electronic filing manager to the following parties or their attorneys whose email addresses are on file with the electronic filing manager.

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